Supreme Court, U.S.
FILED
FEB 10 1999
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(2)

No. 98-1106

In the Supreme Court of the United States

OCTOBER TERM, 1998

ACM PARTNERSHIP, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether purported losses from a tax-motivated transaction were properly disregarded in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 157 F.3d 231. The opinion of the Tax Court (Pet. App. 1b-105b) is reported at 73 T.C.M. (CCH) 2189.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1998. The petition for a writ of certiorari was filed on January 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On its 1988 consolidated federal income tax return, the Colgate-Palmolive Company reported

$104,743,250 in long-term capital gains (Pet. App. 4a). Those gains were largely attributable to the sale of a wholly-owned subsidiary of Colgate known as The Kendall Company (*ibid.*).

In the spring of 1989, representatives of Merrill Lynch approached Colgate with a proposal for a transaction to create a paper loss in an effort to shelter from tax the capital gain reported on Colgate's 1988 return (Pet. App. 4a). The proposal involved (i) creating a partnership that would have a foreign entity not subject to United States taxation as one of its partners and (ii) having that partnership enter into a contingent installment sale to invoke the ratable basis recovery rule in Temporary Income Tax Regulations Under the Installment Sales Revision Act (Temp. Treas. Reg.) § 15a.453-1(c)(3)(i) (1981). The ratable basis recovery rule is a rule of tax accounting that applies to "contingent installment sales" of property under the installment method of accounting of Section 453 of the Internal Revenue Code. A contingent installment sale is a transaction that extends over a period of more than one year and that has an indeterminate sales price on the date of sale. The ratable basis recovery rule allows the seller in a contingent installment sale to recover its basis in the asset over the period of the transaction.

The details of the Merrill Lynch proposal were as follows (Pet. App. 9a-11a):

(i) Colgate was to enter into a partnership with Merrill Lynch and with a foreign entity that was not subject to United States taxation.

(ii) Upon the formation of the partnership, the foreign entity was to have the overwhelming majority partnership interest while Colgate would have a minority interest and Merrill Lynch would have a negligible interest.

(iii) To come under the ratable basis recovery regulation, the partnership was to purchase short-term private placement securities that were eligible for the installment method of accounting under Section 453 of the Code and was then promptly to sell those instruments for a large amount of cash and a comparatively small amount of debt instruments whose yield over a fixed period of time was not ascertainable.

(iv) Under Temp. Treas. Reg. § 15a.453-1(c)(3)(i), the partnership would claim a large "basis" in those instruments.

(v) In the first year, the partnership would report a large "gain" under the regulation, computed as the excess of the amount of the cash received in the sale over the comparatively minor amount of basis recovered for that year. Because the foreign partner would own a large majority interest during that year, most of the paper gain would be allocated to the foreign partner and would therefore escape United States taxation.

(vi) In a later year, the foreign partner's interest would be redeemed, leaving Colgate with more than 99% of the partnership interest.

(vii) The partnership would then dispose of the remaining debt instruments. Because the basis of those instruments would greatly exceed their value, the disposition would produce a large paper loss. Because Colgate would have almost a 100% interest in the partnership at that time, the "loss" realized on the disposition of the debt instruments would be allocated almost entirely to Colgate. Colgate would carry back this "loss" to its 1988 tax year to shelter from tax the capital gain realized by Colgate from its sale of the Kendall division.

The Merrill Lynch proposal was implemented in the fall of 1989 (Pet. App. 16a). Colgate and Merrill Lynch created subsidiary corporations that entered into a partnership with an affiliate of Algemene Bank Nederland, N.V. (ABN), one of the Netherlands's largest financial institutions (*ibid.*).[1] The Colgate subsidiary was known as Southampton-Hamilton Company; the Merrill Lynch subsidiary was known as MLCS; and the ABN affiliate (which was incorporated in the Netherlands Antilles) was known as Kannex (*ibid.*). The partnership that they formed is petitioner ACM Partnership.

Kannex contributed $169,400,000 to the partnership in return for an 82.63% partnership interest (Pet. App. 17a). Southampton contributed $35,000,000 for a 17.07% partnership interest (*ibid.*). MLCS contributed $600,000 for a 0.29% partnership interest (*ibid.*). On November 2, 1989, the partnership deposited the total amount contributed ($205 million) in a bank account at ABN New York, which paid interest at an annual rate of 8.72% (*ibid.*). On the next day, petitioner withdrew the funds and purchased five-year Citicorp Notes that paid interest at a floating rate that was reset monthly (*ibid.*).[2]

On November 27, 1989, petitioner sold Citicorp Notes with a face value of $175 million to two foreign banks, receiving in return $140 million in cash and eight London Interbank Offering Rate (LIBOR) Notes (Pet.

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[1] ABN also served as the foreign partner in ten similar arrangements marketed by Merrill Lynch to large United States corporations (Pet. App. 14b).

[2] The initial rate was 8.75% (Pet. App. 17a). On November 15, 1989, Citicorp made an interest payment and reset the interest rate to 8.65% (*id.* at 17a-18a).

App. 19a).[3] The LIBOR is the primary fixed income rate used in Euro markets (*id.* at 7b n.2). LIBOR Notes are instruments that pay variable amounts at three-month periods (reflecting adjustments in the LIBOR during the period) on a fixed sum ("a notional principal amount") (*ibid.*).[4] The LIBOR Notes purchased by petitioner provided for quarterly payments for 20 quarters commencing March 1, 1990, on a notional amount of $97.76 million (*id.* at 19a).

2. On its partnership return for the 1989 taxable year (ending on November 30, 1989), petitioner treated the sale of the Citicorp Notes as an "installment sale" under Section 453(b) of the Internal Revenue Code and as a "contingent payment sale" under Temp. Treas. Reg. § 15a.453-1(c) (Pet. App. 22a). Petitioner therefore reported a gain of $110,749,239.42 from these transactions in 1989, which reflected the excess of the cash received from the sale of the Citicorp Notes ($140 million) over the portion of the basis in the LIBOR Notes recovered during that year ($29,250,760.58) (*id.* at 23a). This gain was allocated to the partners based upon their ownership interests: $91,516,688.57 was allocated to the foreign partner (Kannex), which paid no United States tax (or any other tax) on the gain; $18,908,406.73 was allocated to the Colgate subsidiary (Southampton); and $324,144.12

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[3] Petitioner sold Citicorp Notes with a face value of $125 million to the Bank of Tokyo and Citicorp Notes with a face amount of $50 million to Banque Francaise du Commerce Exteriur (BFCE) (Pet. App. 19a).

[4] The owner of a LIBOR Note effectively purchases a stream of payments for a certain period that includes a recovery of principal as well as an interest component. The purchaser of a LIBOR Note makes a profit if the rate rises, and incurs a loss if the rate declines.

was allocated to the Merrill Lynch subsidiary (MLCS) (*ibid.*).

Immediately after this sale, petitioner computed its basis in the LIBOR Notes as $146,253,803 (Pet. App. 23a). Of this amount, $41,786,801 was attributable to the LIBOR Notes purchased from BCFE (see note 3, supra) which, in December 1989, petitioner assigned to Southampton as a partial return of capital (*id.* at 21a). On December 22, 1989, Southampton sold these notes to Sparekessen SDS, a Danish bank, for an aggregate consideration of $9,406,180 (*ibid.*).[5]

On its consolidated federal income tax return for the 1989 taxable year (which ended December 31, 1989), Colgate reported its distributive share of the partnership capital "gain" ($18,908,407) and claimed a capital "loss" of $32,429,839 from Southampton's sale of the BFCE LIBOR Notes (Pet. App. 24a). Colgate thus claimed a net capital loss for 1989 of $13,521,432 from its Southampton transactions (*ibid.*).

3. On June 25, 1991, Colgate paid $85,897,203 to Kannex for a 38.31% partnership interest in petitioner (Pet. App. 21a). On that same date, Southampton purchased a 6.69% partnership interest in petitioner from Kannex for $15 million (*ibid.*). On November 27, 1991, petitioner purchased the remaining 43.13% interest in the partnership from Kannex for $100,775,915 (*id.* at 22a). At that point, Colgate and Southampton collectively owned a 99.7% interest in petitioner (*ibid.*). On December 17, 1991, petitioner sold the remaining LIBOR Notes to BFCE for $10,961,581 (*ibid.*).

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[5] This price was only slightly less than the purchase price of these notes ($10,144,161) when they were acquired by the partnership in November 1989 (Pet. App. 24a).

On its partnership return for the 1991 taxable year (which ended December 31, 1991), petitioner reported a capital loss in the amount of $84,997,111, reflecting the difference between the amount received on the sale of the LIBOR Notes ($10,961,581) and the remaining basis in those Notes ($95,958,692) (Pet. App. 26a). On its 1991 consolidated federal income tax return, Colgate claimed a capital loss in the amount of $84,537,479, reflecting its allocable share of the loss reported by petitioner (*id.* at 26a-27a). Colgate then filed an amended return for 1988 in which it sought to carry this loss back to that year (*id.* at 27a). While the total tax loss claimed by Colgate from the transaction arranged by Merill Lynch exceeded $98 million (*id.* at 27a n.22), the actual out-of-pocket cost to Colgate from the entire transaction was less than $6 million (*id.* at 26a).

The Internal Revenue Service audited petitioner's partnership returns for 1989 through 1991 and determined that the Merrill Lynch transaction was an economic sham that should not be recognized for tax purposes (Pet. App. 27a). The Commissioner therefore adjusted petitioner's returns to eliminate the capital gain reported for 1989 and the capital losses reported for 1989 and 1991 (*ibid.*).[6]

4. Petitioner filed a petition in Tax Court to contest the proposed adjustments.[7] The Tax Court, however,

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[6] The Commissioner also proposed alternative adjustments that reflected other theories. Neither the Tax Court nor the Third Circuit addressed those theories.

[7] As a result of amendments to the Internal Revenue Code made by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324, tax litigation involving partnership items now is conducted in a single proceeding in the name of the partnership. Following the completion of such litigation, appropriate computational adjustments are made to the tax

sustained the Commissioner's determinations (Pet. App. 1b-105b). The court explained that (*id.* at 66b-67b):

> In this case, * * * the taxpayer desired to take advantage of a loss that was not economically inherent in the object of the sale, but which the taxpayer created artificially through the manipulation and abuse of the tax laws. A taxpayer is not entitled to recognize a phantom loss from a transaction that lacks economic substance.

The Tax Court described in detail why the transaction lacked economic substance (Pet. App. 67b-105b). Viewing the transaction primarily from Colgate's perspective—because Colgate was the intended beneficiary of the tax avoidance strategy and bore virtually all the costs of the transaction (*id.* at 76b)—the court noted that the purchase and sale of the Citicorp Notes resulted in multi-million dollar transaction costs for Colgate, that the Notes had a yield advantage of only 3 basis points over the yield that petitioner was earning in an ABN Deposit Account and that, over the 24-day holding period for the Notes, that yield advantage provided petitioner with only $3,500 in additional income of which Colgate's share was $600 (*id.* at 81b). Because there was no realistic possibility that Colgate would recover the large transaction costs incurred in making

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returns of each of the partners to reflect the results of the partnership level litigation. See 26 U.S.C. 6221-6233. The instant litigation thus was conducted in the name of petitioner, ACM Partnership. Colgate-Palmolive Company, however, which owned, directly and through its wholly-owned subsidiary, 99.7% of the partnership interests in petitioner as of December 31, 1991, and thereby claimed on its corporate return for that year virtually all of the loss of approximately $85 million reported by petitioner on its 1991 return, is the real party in interest.

the purported "investment" in the Citicorp Notes, the court concluded that its "investment" in those Notes lacked any genuine economic motive and "was not pursued with a realistic expectation of realizing an economic profit" (*id.* at 81b-82b).

The Tax Court similarly determined that Colgate did not have a realistic possibility of recovering its multi-million dollar transaction costs from the "investment" in the LIBOR Notes (Pet. App. 76b-78b). The court found that Colgate would have recovered those costs only if the LIBOR had risen by at least 400-500 basis points immediately after the Notes were purchased and remained at that higher level throughout the 5-year life of the Notes (*id.* at 77b). After examining historical data, the Tax Court found that "Colgate could not have achieved a non-negative net present value under any reasonable forecast of future interest rates" (*ibid.*). The court concluded (*id.* at 104b-105b):

> But for the $100 million of tax losses it generated for Colgate, the section 453 investment strategy would not have been consistent with rational economic behavior. The section 453 investment strategy lacked economic substance. It served no useful nontax purpose.

5. The court of appeals agreed with the Tax Court that the sham paper losses reported by petitioner were not recognizable for federal tax purposes (Pet. App. 62a, 65a). Relying on a line of authority commencing with this Court's decision in *Gregory* v. *Helvering*, 293 U.S. 465 (1935), the court of appeals held that petitioner's purchase and sale of the Citicorp Notes should not be recognized for federal tax purposes (Pet. App. 37a-45a). The court noted that the transaction in Citicorp Notes "had no effect on [petitioner's] net eco-

nomic position or non-tax business interests" (*id.* at 41a) and concluded that the "phantom loss" generated by that transaction "cannot form the basis of a capital loss *deduction under the Internal Revenue Code*" (*id.* at 45a). In reaching that conclusion, the court of appeals rejected petitioner's argument that the decision in *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554 (1991)—which involved the tax consequences of an exchange of interests in residential mortgage loans—supports a conclusion that petitioner's sham paper losses from its transaction in Citicorp Notes are to be recognized (Pet. App. 43a):

> While the dispositions in *Cottage Savings* and in this case appear similar in that the taxpayer exchanged the assets for other assets with the same net present value, beneath this similarity lies the more fundamental distinction that the disposition in Cottage Savings precipitated the realization of actual economic losses arising from a long-term, economically significant investment, while the disposition in this case was without economic effect as it merely terminated a fleeting and economically inconsequential investment, effectively returning [petitioner] to the same economic position it had occupied before the notes' acquisition 24 days earlier.

The court of appeals noted that, in *Cottage Savings*, this Court had emphasized that a loss deduction is allowable only when the taxpayer has sustained a "bona fide" loss (*id.* at 43a). By contrast, the paper losses at issue in this case, "which are purely an artifact of tax accounting methods and which do not correspond to any actual economic losses, do not constitute the type of 'bona fide'

losses that are deductible under the Internal Revenue Code and regulations" (*id.* at 44a).[8]

The court of appeals concluded, however, that the *actual* loss of approximately $6 million sustained by petitioner in arranging and executing this sham investment in LIBOR Notes should be recognized (Pet. App. 62a-66a). The court stated that petitioner's "possession and disposition of the LIBOR notes was distinct from the contingent installment exchange which constituted the underlying sham transaction and * * * had sufficient non-tax economic effect to be recognized as economically substantive" (*id.* at 66a).

ARGUMENT

The court of appeals correctly held that the capital losses reported by petitioner from its purported installment sales transaction should be disregarded. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The Internal Revenue Code contains numerous rules designed to provide an accurate measure of a taxpayer's actual gain or loss from specific transactions. Because tax accounting "focus[es] on the need for an accurate determination of the net income from operations of a given business for a fiscal period" (*Massey Motors* v. *United States*, 364 U.S. 92, 106 (1960)), Section 1001 of the Code provides generally that gain or loss from the sale or other disposition of property is to be reported in the year the transaction occurs.

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[8] Judge McKee dissented (Pet. App. 67a-72a). Although complimenting the majority on a "finely crafted opinion" (*id.* at 72a), he concluded that the transaction should be respected because it came within the literal terms of the ratable basis recovery regulation (*id.* at 71a).

26 U.S.C. 1001.[9] Section 453 of the Code, however, provides an exception to that general rule by allowing taxpayers to elect an installment method of accounting for income from an "installment sale," which is defined as "a disposition of property where at least 1 payment is to be received after the close of the taxable year in which the disposition occurs." 26 U.S.C. 453(b)(1). Under the installment method of accounting, "the income recognized for any taxable year from a disposition is that proportion of the payments received in [the taxable] year which the gross profit * * * bears to the total contract price." 26 U.S.C. 453(c).

Prior to 1980, the installment method of accounting was available only to a taxpayer who had a "gain" from an installment sale. A taxpayer who incurred a loss from such a transaction could not report the loss on the installment method. *Martin* v. *Commissioner*, 61 F.2d 942 (2d Cir. 1932). The installment method was also unavailable in situations where more than a *de minimis* portion of the sales price was unascertainable. *In re Steen*, 509 F.2d 1398, 1403-1404 (9th Cir. 1975); *Gralapp* v. *United States*, 458 F.2d 1158, 1160 (10th Cir. 1972).

In 1980, Congress determined that "a taxpayer should be permitted to report gain from a deferred payment sale under the installment method even if the selling price may be subject to some contingency." S. Rep. No. 1000, 96th Cong., 2d Sess. 23 (1980-2 C.B. 494, 506). In the Installment Sales Revision Act of 1980,

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[9] The gain from a transaction is the sum by which the amount realized by the taxpayer exceeds the taxpayer's adjusted basis in the property. 26 U.S.C. 1001(a). The loss from a transaction is the sum by which the taxpayer's adjusted basis in the property exceeds the amount realized by the taxpayer. *Ibid.* The taxpayer's adjusted basis in property generally equals the cost of the property. 26 U.S.C. 1012.

Pub. L. No. 96-471, § 2, 94 Stat. 2251, Congress directed the Secretary of the Treasury to issue "regulations providing for ratable basis recovery in transactions where the gross profit or the total contract price (or both) cannot be readily ascertained." 26 U.S.C. 453(j)(2). Pursuant to this grant of authority, the Treasury issued Temp. Treas. Reg. § 15a.453-1(c)(3)(i) to provide a method for accounting for the basis of an asset that is recovered over a period of more than one year in a contingent sales transaction. The regulation permits a taxpayer who ultimately incurs a loss on such a transaction to use an installment method of accounting but, as the court of appeals recognized (Pet. App. 43a-44a), any loss resulting from such a transaction may be deducted only to the extent that it constitutes an actual, economic "loss." 26 U.S.C. 165(a). As related Treasury regulations have long made clear, "only a bona fide loss is allowable. Substance and not mere form shall govern in determining a deductible loss." Treas. Reg. § 1.165-1(b).

b. The tax-avoidance arrangement involved in this case was constructed by Colgate, and implemented through petitioner, to create a large paper loss as a basis for a deduction that did not reflect a "bona fide loss" of invested funds. This scheme involved a partnership formed between a wholly-owned Colgate subsidiary and a foreign entity not subject to United States taxation, with a paper gain allocated at the beginning of the transaction to the non-taxable foreign entity and with the corresponding paper loss allocated at the end of the transaction to Colgate. As the result of this sham economic transaction, petitioner reported a tax loss of approximately $85 million on its 1991 return even though its actual economic loss from designing and implementing the sham transaction was less than $6

million. Virtually all of this purported loss was allocated to Colgate and claimed as a deduction on its 1991 return.

The court of appeals correctly determined that petitioner's purported installment sales transaction lacked economic substance and therefore that neither the paper gain nor the paper loss should be recognized. The court properly disregarded the purchase and sale of the Citicorp Notes and treated the transaction as if petitioner had purchased the property acquired with the Citicorp Notes—the LIBOR Notes—directly with cash (Pet. App. 37a-45a). Because a transaction of this nature does not qualify for the treatment provided by the ratable basis recovery regulation, the court held that the transaction did not create a loss for petitioner that could be claimed by Colgate. Instead, as the court concluded, only the actual economic loss of $6 million incurred in arranging and implementing this sham transaction could be recognized for tax purposes (*id.* at 66a).

2. In concluding that the huge paper losses reported by petitioner were devoid of economic substance and should therefore be disregarded, the court of appeals merely applied well-established principles of federal tax law to the complicated facts of this case. This Court has long made clear that transactions lacking economic substance that are employed to circumvent the intended operation of a statute—and thereby to create tax benefits never intended by Congress—must be disregarded. *Gregory* v. *Helvering*, 293 U.S. 465, 469-470 (1935); *Minnesota Tea Co.* v. *Helvering*, 302 U.S. 609, 613 (1938); *Griffiths* v. *Commissioner*, 308 U.S. 355, 357-358 (1939); *Commissioner* v. *Court Holding Company*, 324 U.S. 331, 334 (1945). In *Knetsch* v. *United States*, 364 U.S. 361, 365-366 (1960), the Court

applied that principle to deny a taxpayer a deduction for interest expenses nominally incurred by him when the actual, economic cost to the taxpayer of the putative interest expenses was only a small fraction of the claimed amount. The transparent tax avoidance scheme employed by Colgate in this case is thus precisely the type of sham arrangement lacking in economic substance that this Court has long held represents "nothing more than a contrivance" that "lies outside the plain intent of the statute" and therefore must be disregarded. *Gregory* v. *Helvering*, 293 U.S. at 469, 470.

The purpose of the ratable basis recovery regulation is to provide an accurate accounting of a transaction that extends over a period of more than one year. Because petitioner incurred an actual loss of less than $6 million from the transaction in question, that is the only loss that is recognizable. As the court of appeals explained in this case, the regulation cannot properly be read to authorize the bifurcation of "a loss component of a transaction from its offsetting gain component to generate an artificial loss" (Pet. App. 44a). Recognizing such a phantom loss would stand the tax accounting principle applied in the regulation on its head. See *Higgins* v. *Smith*, 308 U.S. 473, 476-477 (1940).

3. Petitioner errs in contending (Pet. 15-17) that the decision in this case conflicts with the decision of this Court in *Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. 554 (1991). As the court of appeals correctly recognized (Pet. App. 42a-44a), *Cottage Savings* did not involve the deductiblity of artificial paper losses. The issue in *Cottage Savings* involved the *timing* of the recognition of *bona fide* losses—the case concerned whether a taxable "disposition of property" within the meaning of 26 U.S.C. 1001(a) occurred when the tax-

payer exchanged its interests in a group of residential mortgage loans whose fair market value had declined over time for another group of residential mortgage loans of equivalent value. The Court held that the transaction involved "materially different" properties within the meaning of Treasury Regulation § 1.1001-1 and therefore constituted a "disposition of property" for purposes of Section 1001(a) of the Code. Because the taxpayer in that case had suffered an actual economic loss from the transaction—the difference between its investment in the mortgage loans that were transferred and the fair market value of the mortgage loans that were received —the Court concluded that the loss was deductible at the time that transaction occurred. 499 U.S. at 567-568.

Cottage Savings provides no support for the notion that a taxpayer may (at *any* time) deduct a loss that has not in fact occurred. Nothing in that opinion abrogates the well-established requirement that, to be deductible, losses must be bona fide and actually sustained during the taxable year. 26 U.S.C. 165(b); 26 C.F.R. 1.165-1(b). To the contrary, in *Cottage Savings* the Court expressly confirmed the fundamental rule that "[o]nly a bona fide loss is allowable." 499 U.S. at 567 (quoting 26 C.F.R. 1.165-1(b)).

4. Petitioner further errs in contending (Pet. 17-20) that the decision of the court of appeals is inconsistent with the language of Section 453 and the ratable basis recovery regulation. The court of appeals properly analyzed the statute and regulation and correctly stated that petitioner "confounds a tax accounting regulation which merely prescribes a method for reporting otherwise existing deductible losses that are realized over several years with a substantive deductibility provision authorizing the deduction of certain losses" (Pet. App.

44a). "Only a bona fide loss is allowable" under any Section of the Code, including Section 453. 26 C.F.R. 1.165-1(b).

Petitioner's assertion that the decision in this case "undermines the balance between the three branches of government" (Pet. 20) is frivolous. The court of appeals simply applied a venerable principle of federal tax law articulated by this Court more than sixty years ago in *Gregory* v. *Helvering* to deny petitioner a claimed loss deduction to the extent that no actual, economic loss was established. The court's sensible and thorough reasoning does not support petitioner's exaggerated claim of a constitutional crisis in tax litigation.[10] The decision of the court of appeals merely applies the established principle that a taxpayer may not claim a deduction from sham transactions that lack economic purpose and that do not generate "bona fide losses" (*Cottage Savings Ass'n* v. *Commissioner*, 499 U.S. at 567).

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[10] Similarly, petitioner's contention (Pet. 22-23) that the decision of the court of appeals effectively grants the Treasury "equitable relief" from its own regulation lacks any merit. As the court correctly recognized, this tax accounting regulation does not authorize a deduction for "phantom" paper losses (Pet. App. 45a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1999